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No. 90-131

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,

v.

COLUMBIA GAS TRANSMISSION CORPORATION, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF IN OPPOSITION OF RESPONDENT, MUNICIPAL DEFENSE GROUP

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QUESTION PRESENTED

Whether the decision of the court below precluding retroactive ratemaking by natural gas pipeline companies regulated under the Natural Gas Act, should be reviewed, where the court followed the plain meaning of the statute and precedents of both this Court and the circuit courts of appeal to reach a result consistent with the basic congressional objective to protect gas consumers.

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The Respondent, Municipal Defense Group ("MDG") is an *ad hoc* group of ten small municipal publicly-owned gas systems which, during the time period at issue here, purchased all their gas supply from Panhandle Eastern Pipe Line Company. The rates and charges of Panhandle Eastern Pipe Line Company to MDG were increased, pursuant to the orders of the Federal Energy Regulatory Commission ("FERC" or "Commission"), which orders were reversed and re-

manded by the decision of the United States Court of Appeals for the District of Columbia Circuit below.[1]

COUNTERSTATEMENT

At page 3 of its Petition for Writ of *Certiorari*, the Commission alleges that Section 601 of the Natural Gas Policy Act ("NGPA"), 15 U.S.C. § 3431, guaranteed the pipelines the passthrough of all Section 110, 15 U.S.C. § 3320, costs allowed by the Commission. However, as MDG discussed at MDG Br. 6-7, it was unrebutted below that Section 601 does not apply to retroactive rates.

At 10, the Commission alleges that the court below "did not question the authority of the Commission in this case to waive the *statutory* notice requirement in Section 4(d) to the extent necessary to allow the

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[1] On June 22, 1990, Panhandle Eastern Pipe Line Company, *et al.* also filed a petition for writ of *certiorari* to the United States Court of Appeals for the D.C. Circuit in No. 89-2001 regarding the same D.C. Circuit opinion which is the subject of the current petition. On or about July 2, 1990, one of the respondents, Columbia Gas Transmission Corporation requested an extension of time to file responses to all the petitions for writs of *certiorari* regarding the D.C. Circuit decision below. This request was not served on parties, such as MDG. Soon thereafter, the Clerk of the Supreme Court granted Columbia Gas' request for an extension of time. However, MDG's copy of the this grant was apparently lost in the mail and never received by MDG. Accordingly, MDG filed its response in opposition to Panhandle Eastern Pipe Line Company, *et al.*'s petition in No. 89-2001 on July 25, 1990. References herein to MDG's brief in opposition to the petition in No. 89-2001, filed on July 25, 1990, are designated "MDG Br." References to the appendix attached to MDG's brief are designated "MDG App." References to the appendix of the petitioners in No. 89-2001 are designated "Pet. App."

rate change to be given effect as of 1980." However, this is a misstatement. In the decision below, Pet. App. at 9a, the court said:

> We conclude that while the Commission has considerable latitude to waive the notice requirement under Section 4(d), its powers do not encompass what it claims in this case.

The court explained that the only situation where the Commission's Section 4(d) [of the Natural Gas Act ("NGA"), 15 U.S.C. § 717c(d)] waiver power could extend backward, past the original filing date, would be where the rate increase was not retroactive, but prospective from a previous effective date as contemplated by a contract between the parties. And, inasmuch as there was no such contract between the parties in the instant case, the lower court rejected the Commission's view that it had authority to waive the statutory notice requirement of Section 4(d) to make these increased rates effective as of 1980.

RESPONSE TO ALLEGED REASONS FOR GRANTING THE PETITION

The Commission commences its alleged reasons for granting the petition with a discussion of the Commission's "moratorium" "imposed" in July, 1980 which allegedly prevented producers from collecting NGPA Section 110 costs on an interim basis. At 12, the Commission further states:

> The pipelines' downstream customers had no reasonable expectation in 1980 that they would be able to avoid ultimate responsibility for these costs. The Commission's approval

> of direct billing is consistent with the customers' expectations . . . .

However, as discussed in MDG's Br. at 4, the Commission did not impose a "moratorium" on the producers, because no right to collect Section 110 costs prior to their determination by the Commission is mandated, or even suggested, by the NGPA. Moreover, MDG had no expectations or knowledge in 1980 that these Section 110 costs even existed because MDG did not receive notice, either *de facto* or *de jure*, of the proposal to charge MDG any Section 110 costs until many years after 1980. MDG Br. at 24-25.

Additionally, at 12-13, the Commission argues:

> By contrast, the court of appeals' decision setting aside the Commission's orders will require the pipelines to attempt to charge the past costs to their future customers, thereby creating substantial inequities and market distortions and departing from the standard ratemaking principle that customers should bear costs incurred for their benefit. Moreover, the higher sales rates will render the pipelines' sales rates less competitive and thus could accelerate their loss of sales customers. If, for this reason, the pipelines were unable to pass the costs on in their future sales, the costs would be "trapped" with the pipelines (compare *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 970 (1986)), thereby undermining the policy of Section 601 of the NGPA generally permitting pipelines to pass on the costs they incurred in purchasing gas.

However, nothing in the decision below suggests that it would be appropriate for the Commission to permit the pipelines to charge these retroactive costs to their future customers. The Commission's argument also ignores the fact that neither it nor any other party challenged MDG's showing that while the Commission had the power to "untrap" these costs, it had no authorization pursuant to law or equity to charge these costs to consumers, present or future. MDG Br. at 2-3, 6-8, 27 n.14, MDG App. at 1a-8a.

A. The Commission's *Post Hoc* Rationalizations Contradict The Decisions Of This Court, Those Of The Courts Of Appeal, Those Relied Upon By The Commission Below, And The Commission's Contemporaneous Argument In Other Proceedings Before This Court

The gravamen of the Commission's petition is that when a utility files a rate increase pursuant to NGA Section 4, the prohibition against retroactive rate increases contained in Section 5, 15 U.S.C. § 717d does not come into play at all. Thus, according to the Commission, Sections 4 and 5 are to be read independently of each other and only Section 4, not Section 5, can be applied to a utility's rate increase filing. Commission Petition at 16-18.

As this Court has noted:

> [T]he Court "cannot 'accept appellate counsel's post hoc rationalizations for agency action; for an agency's order must be upheld, if at all, 'on the same basis articulated in the order by the agency itself.' "

FPC v. Texaco, 417 U.S. 380, 397 (1974), *quoting Burlington Truck Lines v. United States*, 371 U.S.

156, 168-169 (1962); *see also, Motor Vehicle Manufacturers Assn. v. State Farm Mutual Insurance*, 463 U.S. 29, 43 (1983).

In a similar vein, this Court has refused to consider arguments not first tendered to the lower court. *Moragne v. State Marine Lines*, 398 U.S. 375, 378 n.1 (1970); *Giordenello v. United States*, 357 U.S. 480, 488 (1958); *California v. Taylor*, 353 U.S. 553, 556 n.2 (1957); *see also, Mobil Oil Corp. v. FPC*, 417 U.S. 283, 309-310 (1974).

The Commission's Section 4 argument violates the above cited law to an egregious extreme. Notwithstanding that this proceeding has been before the D.C. Circuit for briefing and oral argument twice; notwithstanding that the Commission has issued a number of orders and decisions which were subject to the appellate reviews at issue here; notwithstanding that the Commission has filed another petition seeking a writ of *certiorari* to the D.C. Circuit regarding *Associated Gas Distributors v. FERC*, 893 F.2d 349 (D.C. Cir. 1989) [*"AGD II"*] (which petition the Commission views as subsuming the instant proceeding), the Commission has never advanced this position before. Moreover, the Commission cites no case law in support of this position and the position is wholly inconsistent with those previously taken by the Commission and the case law it has previously cited in support of its decisions on appeal.

In one of the orders on appeal to the D.C. Circuit in the proceedings below, Docket No. RP88-203-000, *Panhandle Eastern Pipe Line Company*,[2] the Com-

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[2] Pet. App. at 33a-39a.

mission relied chiefly on the precedent of *City of Piqua, Ohio v. FERC*, 610 F.2d 950 (D.C. Cir. 1979). Pet. App. at 38a, n.8. In that later case, the utility sought an increase under Section 205 of the Federal Power Act, 16 U.S.C. § 824d, the analog of Section 4 of the NGA. Nonetheless, the court found that the applicable law included the prohibitions against retroactive ratemaking contained primarily in Section 206 of the Federal Power Act, 16 U.S.C. § 824e (the analog of Section 5 of the NGA):

> In essence, the rule against retroactivity is "a cardinal principle of ratemaking[:] a utility may not set rates to recoup past losses, nor may the Commission prescribe rates on that principle." . . . If the Commission finds rates or charges unreasonable, it may only substitute reasonable rates "to be thereafter observed and in force . . . ." . . . The retroactive ratemaking rule thus bars utility refunds for past excessive rates, or the Commission's retroactive substitution of an unreasonably high or low rate with a just and reasonable rate.

610 F.2d at 954 (Citations omitted). The *Piqua* court concluded that the Commission could waive the 30-day notice requirement of Section 205(d) and permit the rate increase to become effective prior to the date it was filed with the Commission *only* because that effective date was contemplated by the contract between the parties and therefore was *not* retroactive: "In this case, two parties agreed on new rate schedules and on the effective date for the new contract. The negotiated rate change was not retroactive; it was prospective from the date of the contract." *Id.*

Another Commission order on appeal to the D.C. Circuit below, *Transcontinental Gas Pipe Line Corporation, et al.*,[3] relied primarily on the precedent of *Hall v. FERC*, 691 F.2d 1184 (5th Cir. 1982), *cert. denied*, 464 U.S. 822 (1983). This later case citation was also primarily relied upon by the Commission in its briefing and oral argument to the court below. *See, e.g.*, MDG App. at 11a.

In *Hall v. FERC*, the court commenced its discussion of retroactive ratemaking by noting that in the context of a decision cited to it, *Gillring v. FERC*, 566 F.2d 1323 (5th Cir.), *cert. denied*, 439 U.S. 823, *reh'g denied*, 439 U.S. 997 (1978), where a utility sought a retroactive increase in rates that it had on file with the Commission and there was no contract between the parties permitting such retroactive increase, such filing on the part of a utility *would* constitute a prohibited retroactive rate increase. 691 F.2d at 1191; *see also, Columbia II*, Pet. App. at 11a. The *Hall* court found:

> The question in the present case—whether the grant of a waiver to permit parties to effectuate their contractual agreement violates a policy against retroactive ratemaking was squarely presented to the United States Court of Appeals for the District of Columbia Circuit in *City of Piqua, Ohio v. FERC*, 610 F.2d 950 (D.C. Cir. 1979).

691 F.2d at 1191. The court finally concluded:

> We agree with the D.C. Circuit Court that the policy against retroactive ratemaking

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[3] Pet. App. at 17a-26a.

> which precludes Commission "substitution of an unreasonably high or low rate with the just and reasonable rate" is "immediately distinguishable" from the present situation where the Commission's waiver gives prospective application to the rates contractually authorized by the parties at the effective date contemplated by the contract."

Id. at 1192. It is thus clear that the precedents previously cited and relied upon by the Commission in both its decisions on appeal below and its argument to the court below were wholly inconsistent with and, indeed, fully contradict its new argument which it tenders to this Court, *i.e.*, that Sections 4 and 5 of the Natural Gas Act are to be read separately, and that Section 5's prohibition against retroactive ratemaking does not apply to any rate increase filing by a utility pursuant to Section 4.

Moreover, according to the Commission's new argument, not only did the court below misapprehend the law, so did this Court in *Arkansas Louisiana Gas Company v. Hall*, 453 U.S. 571, 578 (1981), when it said: "The [Natural Gas] Act bars a regulated seller of natural gas from collecting a rate other than the one filed with the Commission and prevents the Commission itself from imposing a rate increase for gas already sold." (In contradiction to the quote above, what the Commission here is alleging is that the Natural Gas Act does not prevent "the Commission itself from imposing a rate increase for gas already sold.").

In addition to the citations above, the list of courts who are also ignorant of the Commission's new-found law would have to include the following: *FPC v. Tennessee Gas Transmission Company*, 371 U.S. 145, 151-

153 (1962); *Public Service Company of New Mexico v. FERC*, 857 F.2d 833 (D.C. Cir. 1988); *Public Service Company of New Mexico v. FERC*, 832 F.2d 1201 (10th Cir. 1987);[4] *Electrical District No. 1 v. FERC*, 774 F.2d 490 (D.C. Cir. 1985); *Public Service Company of New Hampshire v. FERC*, 600 F.2d 944, 957 (D.C. Cir.), *cert. denied*, 444 U.S. 990 (1979); *Belco Petroleum Corp. v. FERC*, 589 F.2d 680, 686-687 (D.C. Cir. 1978); *Indiana & Michigan Elec. Co. v. FPC*, 502 F.2d 336, 344 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 946 (1975); *State Corporation Commission of Kansas v. FPC*, 215 F.2d 176, 183-184 (8th Cir. 1954).

In spite of the above, the Commission cites no case law whatsoever for its new position. The Commission does, however, cite to its "explanation" commencing at page 21 of its *certiorari* petition in *FERC v. Associated Gas Distributors* ("*AGD II*"), No. 89-2016, filed June 21, 1990. Although one could question the relevance of an advocate's citation to his own argument in another case, this particular citation does have particular relevance.

The *AGD II* case at issue in that petition also involved utility filings pursuant to Section 4. Nonethe-

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[4] The *Electrical District* and *Public Service Company of New Mexico* decisions involved electric utilities which filed rates pursuant to Section 206 of the Federal Power Act. However, pursuant to the Commission's argument here, the utilities could have defeated the retroactive ratemaking prohibition of Section 206 by filing a later rate increase pursuant to Section 205, after the Section 206 contracts expired, with a requested waiver of the notice provision and a proposed retroactive effective date sufficiently early so as to render vacuous the court's rulings. *See* MDG Br. at 13-15.

less, commencing at the page 21 cited by the Commission, the Commission completely contradicts the argument made in the instant case, noting: "The prohibition against retroactive ratemaking derives from Sections 4(d) and 5(a) of the NGA." The Commission further acknowledges that the prohibitions of Section 5 would apply to a Section 4 filing if the Commission were imposing a rate increase for gas already sold. The Commission concluded, at page 22, with the explanation that in the *AGD II* case it did not "retroactively substitute a higher rate for the one previously charged by Tennessee for past services, and it did not order Tennessee's customers to pay a higher price for gas they actually purchased during either the base period (1981-1982) or the deficiency period (1983-1986)."

However, in the instant case, the Commission *did* attempt to impose a rate increase on MDG for gas already sold. It *did* order the utilities' customers to pay a higher price for gas they actually purchased during the period 1980 through 1983.

Accordingly, not only is the Commission counsel's *post hoc* rationalization for the Commission's unlawful actions a violation of this Court's prohibition against same and a violation of this Court's prohibition against advancing arguments not raised with the court below, it is in violation of the interpretation of the interrelationship between Sections 4 and 5 and the prohibition against retroactive ratemaking contained in the precedents of this Court, the circuit courts of appeal, the case law citations relied upon by the Commission in its orders below and in its argument to the court below. It is even inconsistent with, and totally contradicted by the Commission's contempor-

aneous argument which it cites to this Court in the Commission's *certiorari* petition in *AGD II*.

B. The Commission's Reading Of Section 4(d) Not Only Violates The Plain Meaning Of The Act, But Would Also Pervert Its Consumer Protection Purposes

At 13-15 the Commission argues that:

> Although the statutory text can be read to suggest that the Commission's waiver authority allows it to do no more than shorten or eliminate the 30-day notice period before rates filed with the Commission may take effect,[5] the courts that have considered the question, including the court below, have uniformly sustained the Commission's authority to grant a waiver under Section 4(d) of the NGA (or Section 205(d) of the FPA) that permits a rate increase to be given an effective date prior to when the increase was filed with the Commission. . . . Although the waivers in those three cases were found to be justified on the ground that they were linked to an agreement between the parties, Section 4(d) of the NGA makes no mention of that factor and thus does not suggest that the existence of an agreement is a necessary condition for the Commission's exercise of its power to grant a waiver. The only condition is "good cause shown."

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[5] MDG submits that the language not only "can be" but *must* be read in that manner. The language employed is that of futurity only. There is no ambiguity and, to read it so as to permit a retroactive increase, would require a violation of the plain meaning of the language employed.

(Citations omitted). However, the Commission advanced the same argument before the lower court and was unable to respond in oral argument to MDG's answer:

> . . . The Commission similarly argues that the NGA permits waiver for "good cause" and nowhere limits good cause to simply effecting the "contractual intent" of the parties. Commission Br. at 31. However, none of the Petitioners here have ever alleged that good cause is limited only to customer consent or contractual intent, but rather only that, consistent with the case law cited previously, a good cause waiver comes into play only where true retroactivity is *not* involved. Thus, the Commission can permit a rate increase to become effective on a 20-day notice, a 10-day notice, or even a zero-day notice, upon a finding of any kind of "good cause." However, if the Commission attempts to make a rate increase effective prior to the date of filing, then it must show, as noted above, either (1) it is not imposing a retroactive rate alteration but simply giving effect to the contractual intent of the parties as to the effective date of a rate or (2) the waiver does not violate the consumer protection purposes of the filed rate doctrine and rule against retroactive ratemaking.

MDG Br. at 16-17.

The court in *Electrical District No. 1 v. FERC*, 774 F.2d 490, 493 (D.C. Cir. 1985) discussed the primary purpose of the filed rate doctrine and prohibition against retroactive ratemaking:

> [The Act's] primary purpose [is] protecting the utility's customers. *See Town of Alexandria, Minnesota v. FPC*, 555 F.2d 1020, 1028 & n.42 (D.C. Cir. 1977). The wholesale purchasers of electricity cannot plan their activities unless they know the cost of what they are receiving, particularly if they are retailers, who must calculate their appropriate resale rates, *cf.*, *Indiana & Michigan Electric Co. v. FPC*, 502 F.2d 336, 344 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 946, 95 S. Ct. 1326, 43 L.Ed.2d 424 (1975), but also if they are large-scale purchaser-users. Providing the necessary predictability is the whole purpose of the well established "filed rate" doctrine, which "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577, 101 S. Ct. 2925, 2930, 69 L.Ed.2d 856 (1981).

As MDG explained to the lower court, a waiver of the *prospective* 30-day notice requirement can come into play for any kind of "good cause." However, as the case citations relied upon by the Commission fully acknowledged, a Section 4(d) waiver cannot overcome the prohibition against a retroactive rate increase. Thus, a Section 4(d) waiver can only permit rates to become effective prior to the filing date where it does not violate the prohibition against retroactive rate increases.

The Commission's most favored precedent, *Hall v. FERC*, explained why the only two justifications for

a "retroactive" effective date are consumer protection and contractual intent:

> . . . The NGA was drafted to encourage and protect the right of parties to establish rates by individual contract. The Act "evinces no purpose to abrogate private rate contracts as such." *United Gas Pipe Line Co. v. Mobile Gas Corp.*, 350 U.S. 332, 338, 76 S. Ct. 373, 378, 100 L.Ed. 373 (1956). In granting Hall's waiver, the Commission could promote the purposes of the Act and preclude Arkla from breaching its contract by delaying Hall's notice filing and using the length of delay to defeat Hall's application. On the other hand, if the Commission took this course but felt compelled to grant a rate increase to Arkla, it would neglect in some respects its duty to protect consumers. The dilemma is one which suggests that the Commission deny any subsequent application for rate increase by Arkla arising from these proceedings. In so doing, the Commission would effectuate [the] dual purposes of the Act. . .

691 F.2d at 1193 n.16.[6]

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[6] The Commission argues that in Maislin Industries U.S. Inc. v. Primary Steel, Inc., 497 U.S. ___, 111 L Ed 2d 94 (1990), the Court ruled that parties may not, by contract, defeat the filed rate doctrine. However, as explained by both petitioners in No. 89-2001 and MDG Br. at 9, the filed rate doctrine applicable to the Interstate Commerce Commission is different from that applicable to the FERC. The ICC can award reparations, whereas the FERC cannot. Moreover, as discussed in *Hall v. FERC* above, the primacy of private rate contracts is one of the dual purposes of the NGA.

In this regard, it is appropriate to note that the essence of the Commission's argument is an attempt to turn the very purposes of the Natural Gas Act on its ear. The NGA was enacted "to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges." *Atlantic Refining Company v. Public Service Commission of New York*, 360 U.S. 378, 388 (1959). Part of the consumer protection built into the NGA was a statutory bias favoring retroactive rate reductions, but not retroactive rate increases:

> It is not insignificant that the Commission acted consistently with the statutory bias favoring retroactive rate reductions but not retroactive rate increases, a bias Congress wrote directly into the statute:
>
> > "[T]he Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or not the lowest reasonable rates."

Belco Petroleum Corp. v. FERC, 589 F.2d 680, 687 (D.C. Cir. 1978); *see also, Gillring v. FERC*, 566 F.2d 1323, 1325 (5th Cir.) *cert. denied*, 439 U.S. 823, *reh'g denied*, 439 U.S. 997 (1978).

However, according to the Commission's new argument, the only prohibition that exists in the NGA

is the prohibition against retroactive rate *reductions*. Any rate increase filed pursuant to Section 4 of the Act, according to the Commission, can be made retroactive wherever and whenever the Commission feels that it has good cause. MDG submits that such a conclusion would make a total mockery of everything Congress and the courts have ever said on this issue. *See also*, MDG Br. at 5-6.

C. The Commission's Request That The Merits Of This Proceeding Not Be Separately Briefed, But Instead Be Made Subject To The Disposition Of AGD II, Is Indefensible

As noted, *supra* at 11, in its *certiorari* petition in *AGD II*, the Commission argued that it did not violate the prohibition against retroactive ratemaking in *AGD II*, but in the process acknowledged that if it had done essentially what it did in the instant case, such conduct would have constituted unlawful retroactive ratemaking. MDG submits that that argument constitutes an admission of the correctness of the decision below in the instant case. At a minimum, the Commission's *certiorari* petition in *AGD II* clearly distinguishes the facts in *AGD II* from the facts of the instant case, and shows that the fact distinction is legally significant.

Similarly, a number of the judges in the D.C. Circuit also felt that the difference in the facts between the instant case and *AGD II* were sufficient to warrant different legal conclusions. Accordingly, whereas rehearing *en banc* was denied *per curiam* in the instant case below, Pet. App. at 15a, there was a dissent from denial of rehearing *en banc* in *Associated Gas Distributors v. FERC*, 898 F.2d 809 (D.C. Cir. 1990) (AGD II).

In any perspective, the Commission's request that the Court deny briefing in the instant case but make the disposition in the instant case subject to its disposition of *AGD II* would be an extraordinary and unsupported procedure. Such procedure essentially would deny MDG the right to be heard on the merits while in effect granting the petition for a writ of *certiorari*. However, in the context of the disparate decisions by the court below on rehearing, the Commission's own acknowledgment that the facts of the instant case are dissimilar from the facts of *AGD II* and that unlawful retroactive ratemaking would exist on the facts of the instant case, the Commission's request is truly incredible and indefensible.

As the preceding has made clear, plenary denial of the Commission's petition or summary affirmance of the court below should be ordered by this Court. However, if for any reason the Court might be inclined to any other disposition, MDG should not be denied its lawful rights to fully participate in any proceeding which would effect its interests.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Petition for A Writ Of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, filed by the Commission in this docket should be denied and/or the decision of the court below summarily affirmed.

Respectfully submitted,

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